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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NO. 293

ROBERT ELI STANLEY,

Appellant,

vs.

THE STATE OF GEORGIA,

Appellee.

BRIEF FOR APPELLANT ON THE MERITS

REPORT OF OPINION OF COURT BELOW

The opinion of the Georgia Supreme Court in this case is officially reported in 224 Ga. 259 and unofficially reported in 161 S.E.2d 309.

CONCISE STATEMENT OF GROUNDS OF THIS COURT'S JURISDICTION

This was a criminal proceeding brought by the State of Georgia charging the appellant with a felony, possessing obscene material in violation of Georgia Code 26-6301 as amended by an Act of the General Assembly of 1963, p. 78.

The judgment of affirmance by the Supreme Court of Georgia sought to be reviewed was dated April 9, 1968, and an order denying a rehearing was dated and filed April 22, 1968. The notice of appeal was filed in the Supreme Court of Georgia May 1, 1968, the appeal was docketed in the Supreme Court of the United States July 16, 1968, and probable jurisdiction was noted Oct. 14, 1968.

Jurisdiction of this appeal has been conferred on this court under and by virtue of 28 U.S.C.A. No. 1257 (2).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

AMENDMENT I—FREEDOM OF RELIGION, SPEECH AND PRESS; PEACEFUL ASSEMBLAGE; PETITION OF GRIEVANCES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT IV—SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularily describing the place to be searched, and the persons or things to be seized.

AMENDMENT XIV—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

CRIMES – SALE, POSSESSION, ETC. OF OBSCENE MATTER.

Code § 26-6301 Amended.

No. 53 (House Bill No. 132).

An Act to amend Code Chapter 26-63, relating to obscene pictures and abusive and vulgar language, as amended, particularly by an Act approved March 17, 1956 (Ga. L. 1956, p. 801), so as to provide that any person who shall knowingly bring, or cause to be brought into this State for sale or exhibition, or who shall knowingly sell or offer to sell, or who shall knowingly lend or give away or offer to lend or give away, or who shall knowingly have possession of, or who shall knowingly exhibit or transmit to another, any obscene matter, or who shall knowingly advertise for sale by any form of notice, printed, written, or verbal, any obscene matter, or who shall knowingly manufacture, draw, duplicate or print, any obscene matter

with intent to sell, expose, or circulate the same, shall, if such person has knowledge or reasonably should know of the obscene nature of such matter, be guilty of a felony, and upon conviction thereof, shall be punished by confinement in the penitentiary for not less than one year nor more than five years; to provide that upon the recommendation of the jury, said offense may be punished as for a misdemeanor; to provide for definitions; to provide for severability; to repeal conflicting laws; and for other purposes.

Be it enacted by the General Assembly of Georgia:

Section 1. Code Chapter 26-63, relating to obscene pictures and abusive and vulgar language, as amended, particularly by an Act approved March 17, 1956 (Ga. L. 1956, p. 801), is hereby amended by striking Code section 26-6301 in its entirety, and inserting in lieu thereof a new section 26-6301 to read as follows:

"26-6301. Any person who shall knowingly bring or cause to be brought into this State for sale or exhibition, or who shall knowingly sell or offer to sell, or who shall knowingly lend or give away or offer to lend or give away, or who shall knowingly have possession of, or who shall knowingly exhibit or transmit to another, any obscene matter, or who shall knowingly advertise for sale by any form of notice, printed, written, or verbal, any obscene matter, or who shall knowingly manufacture, draw, duplicate or print any obscene matter with intent to sell, expose or circulate the same, shall, if such person has knowledge or reasonably should know of the obscene nature of such matter, be guilty of a felony, and upon conviction thereof, shall be punished by confinement in the penitentiary for not less than one year nor more than

five years; provided, however, in the event the jury so recommends, such person may be punished as for a misdemeanor. As used herein, a matter is obscene if, considered as a whole, applying contemporary community standards, its predominant appeal is to prurient interest, i.e, a shameful or morbid interest in nudity, sex or excretion."

Section 2. In the event any section, subsection, sentence, clause or phrase of this Act shall be declared or adjudged invalid or unconstitutional, such adjudication shall in no manner affect the other sections, subsections, sentences, clauses or phrases of this Act, which shall remain of full force and effect, as if the section, subsection, sentence, clause or phrase so declared or adjudged invalid or unconstitutional was not originally a part hereof. The General Assembly hereby declares that it would have passed the remaining parts of this Act if it had known that such part or parts hereof would be declared or adjudged invalid or unconstitutional.

Section 3. All laws and parts of laws in conflict with this Act are hereby repealed.

Approved March 13, 1963.

QUESTIONS PRESENTED FOR REVIEW

1. Whether Georgia Code section 26-6301 (Ga. Laws, 1963, p. 78), under which the appellant was convicted, is repugnant to the First and Fourteenth Amendments to the Constitution of the United States guaranteeing freedom of press and due process in that the statute removes the element of scienter from the definition of the offense of possessing obscene matter, and makes the mere possession of such matter a crime.

2. Whether a search warrant issued by a U. S. Commissioner authorizing a search of premises for bookmaking records and other wagering paraphernalia, founded on affidavits that the person whose home is sought to be searched has not registered as a gambler under the Wagering Tax Act, is invalid since the holding by this court in *Marchetti v. U. S.*, 390 U.S. 39 (88 S. Ct. 697) and *Grosso v. U.S.*, 390 U.S. 62 (88 S. Ct. 709).

3. Whether the Supreme Court of Georgia erred in holding and deciding that the search warrant and the search conducted thereunder were legal.

4. Whether a state officer, acting in concert with federal agents executing a federal search warrant issued for failure to register as a gambler, were constitutionally authorized to seize motion picture films concealed in a desk drawer of appellant's home on a claim by the state officer that the films were obscene where such search warrant did not describe the films to be seized and there was no prior adjudication that they were obscene.

5. Whether a state may constitutionally punish an individual for the mere possession of films alleged to be obscene where there is no evidence to show the appellant had prior knowledge that they were obscene, or that he had ever viewed them, or that he had permitted juveniles to view them, or that he was publishing them in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to them, or that he was "pandering" them.

CONCISE STATEMENT OF THE CASE

The appellant was indicted by the Fulton County Grand Jury for the offense of possessing obscene matter, to-wit: three reels of motion picture film. (A. 5)

Upon his arraignment he filed a general demurrer to the indictment on the ground that the Act was in conflict with the First and Fourteenth Amendments to the U. S. Constitution in removing the element of scienter from the definition of the offense. (A. 7) The trial court, after hearing argument of counsel, overruled the demurrer on all grounds. (A. 9)

Appellant also filed a special demurrer to that portion of the indictment which alleged that "accused should reasonably have known of the obscene nature of said matter," contending that it violated his First and Fourteenth Amendment rights by removing scienter from the offense. (A. 10) This demurrer was overruled by the court. (A. 12)

Appellant filed a motion to suppress the three reels of film from evidence (A. 13) on the grounds they were seized from his home by an Investigator of the Criminal Court "without a lawful search warrant particularly describing said articles to be seized," in violation of his Fourth and Fourteenth Amendment rights and that "no prior adjudication had been made that said articles were obscene" in violation of his First and Fourteenth Amendment rights.

Evidence was heard by the trial court on this motion, at which time the State introduced in evidence a federal search warrant and supporting affidavits issued for the violation of the Federal Wagering Tax Act. (A. 24, 57) After argument of counsel the motion was overruled. (A. 58)

The case proceeded to trial before a jury, and a verdict of guilty was returned and a sentence of one year imposed. (A. 60, 61)

The evidence for the State consisted of testimony by federal agents and one state officer that they searched the appellant's home pursuant to the federal search warrant for the seizure of wagering paraphernalia. They found no articles described in the warrant, but during the course of the search discovered three reels of "stag" film described in the indictment concealed in a desk drawer of one of the bedrooms. They found a motion picture projector and a screen, ran the film and determined in their opinion they were obscene. The films were then seized, the appellant was placed under arrest and the indictment and conviction followed.

The verdict of the jury was returned January 19, 1967, (A. 60) sentence pronounced January 19, 1967 (A. 61) motion for new trial filed the same day (A. iii) and overruled November 20, 1967. (A. iii)

Notice of appeal to the Supreme Court of Georgia was filed December 14, 1967 (A. 62). The appellant enumerated as error the overruling of the motion to suppress evidence, the overruling of the general demurrer to the indictment, the holding by the trial court in its rulings on the demurrers that the Act of the General Assembly under which the appellant was tried was constitutional and not in conflict with the First and Fourteenth Amendments to the United States Constitution; and that the evidence did not support the verdict in that the State failed to prove that appellant exhibited the alleged obscene films to any other person. (A. 64)

The unconstitutionality of the Act of 1963, p. 78, under which appellant was convicted, was first raised in the trial court by the 3rd ground of the general demurrer (A. 7) and the special demurrer (A. 10) and were

overruled by the trial court (A. 9 and 12), enumerated as error in the Georgia Supreme Court, (Grounds 2, 5, and 6, A. 64) passed on by the Georgia Supreme Court adversely to appellant in the 4th section of the opinion, (A. 69, 70 and 71) and motion for rehearing on this ground was made (A. 75 and 76, ground 3).

The invalidity of the search and seizure was first raised in the trial court by the motion to suppress prior to trial (A. 13), overruled by the trial court (A. 58), enumerated as error in the Georgia Supreme Court (A. 64) (Ground 1), and passed on by the Supreme Court of Georgia in Section 1 of the opinion (A. 66). A motion for rehearing of this ground was made. (A. 73, grounds 1 and 2).

The insufficiency of the evidence in failing to show that appellant had exhibited the films to an unwilling individual or a minor was raised in enumeration of error No. 8 in the Georgia Supreme Court, passed upon by that Court in Section 6 of its opinion (A. 71), and a motion for rehearing was made on this ground in paragraph 4. (A. 76).

SUMMARY OF ARGUMENT

1.

Georgia's Obscenity statute, in removing the element of scienter from the definition of the offense of Possessing Obscene Material, violates the First Amendment rights of an individual, in that it makes the mere possession of such matter a crime, without requiring any other act or intent to accompany the mere possession. The rule of *Roth v. United States*, 354 U.S. 476, holding obscenity

not to be protected by the First Amendment, is inapplicable to the *mere possession* of obscene material.

2.

The search warrant, under which the films in this case were seized by federal and state officers, was void because it was issued pursuant to the Wagering Tax Act, whereas this Court, in *Marchetti and Grosso v. United States,* 390 U.S. 39 and 390 U.S. 62, has declared such Act constitutionally unenforceable, thus rendering such search warrants issued pursuant thereto unenforceable.

3.

The Georgia Supreme Court held the search warrant in this case to be valid, even though the appellant, in his motion to suppress in the trial court, alleged the seizure of the films to have been "without a lawful warrant." This holding of the Georgia Supreme Court was error.

4.

The films were seized from the home of the appellant. There was no warrant *particularly describing* the films to be seized. There had been no prior adjudication that the films were obscene. Inasmuch as there was no warrant describing the films to be seized, or determining that they were obscene, the officers in using their own judgment violated the rule of *Marcus v. Search Warrants of Property,* 367 U.S. 717. The seizure of the films under these circumstances violated the appellant's Fourth and Fourteenth Amendment rights.

5.

There was no evidence of prior knowledge by the ap-

pellant that the films were obscene, and no charge made by the State in its indictment that appellant did more than possess them. There is no contention that the State is concerned with juveniles becoming contaminated by the films, no contention that persons who are unwilling to see the films will become exposed to them, and no contention of pandering. Therefore the conviction is contrary to *Redrup v. New York, Austin v. Kentucky* and *Gent v. Arkansas,* 386 U.S. 767.

THE ARGUMENT

1.

CONSTITUTIONALITY OF GEORGIA OBSCENITY LAW

The main question presented by this appeal involves the validity of the Georgia obscenity statute and whether it violates the First and Fourteenth Amendments in authorizing a conviction for mere possession of articles contended to be obscene in removing the element of scienter from the definition of the offense by punishing a possessor on less evidence than it takes to prove actual knowledge of its obscene nature.

The Georgia statute permits a conviction for possessing obscene articles *"if the defendant should reasonably have known of the obscene nature of said matter"* and thus deprives the accused of his liberty even though he has no actual knowledge that it is obscene. Such statute thus places every citizen in jeopardy of punishment by the State for possessing matter of which he may not have actual knowledge, or for believing, as he has a right to under the freedom of press clause of the First Amendment, that in his opinion it is not obscene.

Such statute thus deprives a citizen of the right given by the First Amendment to judge for himself, if he so chooses, as to what photographs, writings or books he may possess in the privacy of his own home.

In *Smith v. California,*

361 U.S. 147

this court held that an ordinance, dispensing with the element of scienter, in a prosecution of a bookseller for possession of obscene articles, was unconstitutional as in conflict with the First and Fourteenth Amendments.

It was recognized in *Smith* that in other types of offenses, such as food and drug legislation, "the public interest in the purity of its food is so great as to warrant the imposition of the highest standard of care on distributors — in fact an absolute standard which will not hear the distributor's plea as to the amount of care he has used." However, the distinction was made because "there is no specific constitutional inhibition against making the distributors of food the strictest censors of their merchandise, but the constitutional guarantees of the freedom of speech and of the press stand in the way of imposing a similar requirement on the bookseller." (P. 152-153.)

This Court held that "by dispensing with any requirement of knowledge of the contents of the book on the part of the seller, the ordinance tends to impose a severe limitation on the public's access to constitutionally protected matter." (P. 153.)

If the State is prohibited, by the First and Fourteenth Amendments, from removing the element of *scienter* from the offense of selling or pandering obscene mate-

rial, and is thus prohibited from punishing a bookseller for selling an obscene book where such seller has no actual knowledge of its contents, may the States prescribe any less a standard against those who are not charged with pandering, selling or distributing, but merely possessing the same material? To put the matter in converse, are the States to be prohibited from convicting a seller who has no knowledge of the contents of the book he is selling, but may the same State convict such seller of *possessing* the same book, even though he was without the same knowledge?

The indictment in this case charges the appellant with knowingly possessing obscene matter. (A. _____) It further charges that he should reasonably have known of the obscene nature of said matter. If he has been called upon to defend his *actual* knowledge, that is one thing. If he has been called upon to defend that he *should reasonably have known* of the obscene nature of said matter, that is another. If the State is able, by some sort of proof, direct or circumstantial, to show that the appellant *should reasonably have known* of the obscene nature of said matter, such proof could be adduced far short of proving that he actually *did know*. This removed the element of *scienter*, and thus took from the appellant the constitutional protection of the First and Fourteenth Amendments.

It would be virtually impossible for any person to have actual knowledge that matter is obscene, nor could he reasonably be expected to have such knowledge, without having actually or constructively *possessed* such matter beforehand. For an individual to have knowledge of the contents of a reel of film, or to reach a determination *of his own* that it is obscene, he must learn

it by viewing the film, or by having been told by another that it is obscene. Thus, to learn firsthand it would be necessary that one *possess* the film in order to see it, and thus discover for himself his own opinion of its contents. To be required to accept the opinion of another that such film is obscene is to be deprived of the constitutional right to access of such picture, and thus be deprived of freedom of speech and press. Furthermore, the opinion of one man that a certain film is obscene may oftentimes not be shared by others. Consequently, in order for one to have knowledge of the contents of a film, or to make a determination for himself that it is obscene, necessarily requires that he possess it, and such possession has been made an offense under Georgia law.

Therefore, if A picks up a book at a newsstand or library, not knowing of its contents, he is in possession of it. If he reads it, in order to make a determination that it is actually constitutionally protected matter, and after reading it first ascertains that it is obscene, he has violated the Georgia law because he has possessed it at the time he *knows* it to be obscene. Such a law is obviously unconstitutional, and can not stand. If he should only have reasonably known of the obscene nature of said matter, instead of actually having such firsthand knowledge, the unconstitutionality of such statute is further removed by one more degree.

The State originally relied upon

Roth v. United States,

354 U.S. 476,

as authority for their proposition that obscenity does not come within the protection of the First Amendment.

However, *Roth* was dealing with the *distribution* or *sale* of obscenity; not with its *mere possession*. More recent decisions of this Court would indicate that the *Roth* rule might be inapplicable when applied to *mere possession*.

Redrup v. New York; Austin v. Kentucky; Gent v. Arkansas, 386 U.S. 767 (87 S.Ct. 1414.)

For example, *Roth* involved *distribution* of obscene material. The decision assumed that *Roth* was aware of the contents, and by the distribution of the material could not claim the protection of the First Amendment. This rule might very well be applied to the seller or distributor, for once ascertaining for himself that the matter is obscene he is on notice not to furnish it to others who might become offended. But *Roth* does not hold that the *mere possessor* of such material can be constitutionally punished. Nor does it hold that the *mere possessor* may not claim the First Amendment's protection as to *his right to decide for himself* whether it offends him.

Thus, to extend the rule of *Roth* to a *mere possessor* would curtail the exchange of books, photographs and films because every man and woman would be in fear of buying such items because they would be in peril of being prosecuted by the State if the book or magazine they have bought turns out to obscene, or the film they are viewing does not meet the standards of morality of their community.

If such article offends the possessor after he has determined for himself that it is offensive, he has two choices. First, he may destroy it, and second, he may keep it. But in either case the possessor could be pun-

ished under the Georgia statute as interpreted by the Georgia Supreme Court because he has already knowingly possessed it, knowing it to be obscene.

In the case at bar, the State has sought and is seeking, to deprive the appellant of his liberty upon the mere claim that he possessed, (apparently for his own use) three reels of film, contended by the State to be obscene, and that he either knew, or reasonably should have known, that they were obscene. No sale is alleged. No exhibition or attempted exhibition is alleged. No advertisement is alleged. No corruption of minors is alleged. No transportation is alleged. In fact, nothing is alleged to have been done by the appellant other than the fact that he did "*possess*" such matter.

The Georgia Supreme Court, however, has construed the Georgia statute to punish the *mere possession* of such articles, by holding:

> "It is not essential to an indictment charging one with possession of obscene matter that it be alleged that such possession was 'with intent to sell, expose or circulate the same'." (App. ___).

This statute, as interpreted by the Georgia Supreme Court, cannot be squared with the First Amendment because it places every citizen at his peril of standing convicted of a felony if, in his library or shelf of motion picture films should be found a book, magazine, photograph or moving picture film that may turn out to be pornographic.

2.

SEARCH WARRANT INVALID

At the time the search warrant was issued in this case, (App. ,) the Wagering Tax Act was being enforced under the authority of

United States v. Kahriger
345 U.S. 22,

and

Lewis v. United States,
348 U.S. 419,

holding the statute to be constitutional.

The warrant was issued by a U. S. Commissioner on the probable belief that a lottery or wagering operation was being carried on at the residence of the appellant, and that inasmuch as sworn evidence was presented that appellant *had not registered or paid his tax as purportedly required* by federal law, a warrant should issue to require the seizure of such implements of gambling as might be found in use there.

On the 7th day of September, 1966, the date the warrant was issued and executed, the federal wagering tax act was being enforced.

However, as of this date both *Kahriger* and *Lewis* have been specifically overruled by this Court.

On January 29, 1968, two weeks after the appellant filed his original brief and enumeration of errors in the Georgia Supreme Court in this case, in the case of

Marchetti v. United States,
390 U.S. 39 (88 S.Ct. 697)

and

Grosso v. United States,
390 U.S. 62 (88 S.Ct. 709)

this Court held:

"We conclude that nothing in the Court's opin-

ions in *Kahriger* and *Lewis* now suffices to preclude petitioner's assertion of the constitutional privilege as a defense to the indictments under which he was convicted. To this extent *Kahriger* and *Lewis* are overruled."

In *Grosso,* the unenforceability of the Wagering Tax Act against one who has even the remotest right to claim the Fifth Amendment privilege was so strongly recognized as an inherent defense to such a charge that even the *failure of the petitioner to assert the claim of privilege was held not to constitute a waiver of the privilege.*

If, in the instant case, the Agent had seized wagering material as a result of the execution of the search warrant, a conviction based thereon would have fallen for the same reasons as those urged in *Marchetti* and *Grosso,* on the theory that appellant would not have been required to criminate himself by registering.

If, applying this same analogy to the validity of the search warrant, the appellant had registered as a gambler and paid his tax, there never would have been federal grounds for the issuance of the search warrant because he would obviously not have violated the federal statute by conducting a wagering operation. Consequently, having the constitutional right to exercise his Fifth Amendment protection by not registering as a gambler bars that same failure to register from being the basis for which a search warrant (the commencement of a prosecution) might validly issue.

The search warrant was therefore void, the seizure of the films was illegal, the finding of the trial court that as a matter of law the warrant was valid and the holding of the Georgia Supreme Court in division one

of its opinion that the warrant and the search thereunder were legal, was erroneous under the Fourth and Fourteenth Amendments to the U. S. Constitution.

3.

GEORGIA COURT'S HOLDING THAT SEARCH WARRANT VALID AND THAT SEARCH WAS LAWFUL

The search and seizure question, while not an appealable question, is substantial and should be treated as a certiorariable question under 28 U.S.C.A. No. 2103.

Appellant, in his motion to suppress, alleged the films to have been seized *"without a lawful warrant."* (A. ____) The warrant was invalid under *Grosso & Marchetti* and should have been declared void by the Georgia Supreme Court.

4.

SEIZURE OF FILMS WITHOUT PRIOR ADJUDICATION OF OBSCENITY

Originally it was recognized by the Supreme Court of the United States in

Wolf v. People of State of Colorado, (1949),
338 U.S. 25,

that "in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable seizure."

In *Mapp v. Ohio,*
367 U.S. 643, (1961),

the Supreme Court overturned this theoretical principle of law, declaring that: "Since the Fourth Amend-

ment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth Amendment, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government."

On the same day that *Mapp* was handed down by the Supreme Court the same principle was applied to the statutes of the State of Missouri as they authorized the search for and seizure of materials sought to be declared obscene.

In *Marcus v. Search Warrants of Property*, 367 U. S. 717,

the Supreme Court declared the Missouri statute to be in violation of the Due Process clause of the Fourteenth Amendment.

In *Marcus*, the appellants, owners of a newsstand where numerous books and periodicals had been seized by police officers under a warrant issued by a magistrate, moved to suppress the evidence because the procedures applied (1) "allowed a seizure by police officers 'without notice or any hearing afforded to the movants prior to seizure for the purpose of determining whether or not these publications are obscene,' and (2) because they 'allowed police officers and deputy sheriffs to decide and make a judicial determination after the warrant was issued as to which magazines were obscene and were subject to seizure, impairing movants freedom of speech and publication'." The Supreme Court then determined that the question was "whether the use by Missouri in this case of the search and seizure power to suppress obscene publications involved abuses inimical to protected expression" and noted that the authority given to "police

officers under the warrants issued in this case, broadly to seize 'obscene publications,' poses problems not raised by the warrants to seize 'gambling implements' and 'all intoxicating liquors' involved in the cases cited by the Missouri Supreme Court." The Supreme Court, after applying the foregoing principles, held:

> "It follows that, under the Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity as here involved without regard to the possible consequences for constitutionally protected speech."

In *Marcus,* the Supreme Court was dealing with even a stronger position insofar as the prosecution was concerned. In *Marcus,* a search warrant had been obtained in the language of the statute and the complaint authorizing the police officers to seize such magazines as in his view constituted "obscene publications." In the case at bar no warrant had been obtained authorizing even this broad seizing power.

In *Marcus,* there was in existence a State statute specifically authorizing the issuance of such a warrant, and prescribing the procedure therefor. Such a warrant was obtained. In the case at bar the officer executing the search of the appellant's home did not seize any matter or thing called for by the warrant, but made a decision, *ad hoc,* that the three reels of film were obscene, without benefit of any prior adjudication by a court or the Literature Commission.

The appellant recognizes that if an officer, executing a valid search warrant, discovers evidence of another and different crime or sees what is known to be contraband, he may make a seizure, even though the warrant does not *particularly describe* the article being seized. However,

as pointed out in the *Marcus* case, supra, the State court's "assimilation of obscene literature to gambling paraphernalia or other contraband for purposes of search and seizure does not therefore answer the appellants' constitutional claim, but merely restates the issue *whether obscenity may be treated in the same way.*" (Emphasis added.)

In quoting from *Speiser v. Randall*, 357 U.S. 513, the Supreme Court reiterated in *Marcus* that "The line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn. The separation of legitimate from illegitimate speech calls for sensitive tools."

It is to be plainly noted in this case that the officer, after discovering three reels of film and making an inspection thereof, did not seek to enlist the aid of a qualified magistrate to make oath to him what he had seen, and to secure an adjudication by such magistrate that the films were obscene, so that at least the semblance of judicial authority would have been obtained so as to authorize the seizure of the films. Instead, the officer called the Solicitor General, whose duty it is to prosecute, and was advised to use "his own judgment" as to whether the films were obscene. (A.)

At what stage of the proceedings in this case did the films become obscene, so as to remove them from the constitutionally protected realm of the First Amendment, and place them in the unprotected area of "obscenity?" Were they obscene when the appellant first came into possession of them, if he ever did? Were they obscene when the officer first viewed them, or when he reported his findings to the Solicitor General? Did they become obscene when the Chairman and members of

the Literature Commission viewed them, or did they only become obscene when the jury in this case returned its verdict finding the appellant guilty of possessing obscene articles?

What is obscenity, and how has it been defined by the courts? Did the appellant know that it was obscene before he had himself viewed it? Was the appellant able to apply the same contemporary community standards as those who later testified at the trial in making his determination that the films were obscene? All these questions, and many more, come to mind in now trying to second guess whether the officer, in making such a determination, was applying the same standards and criteria as those applied by the appellant when the films were seized.

The appellant urges that inasmuch as such a thin line exists between obscenity and non-obscenity a mere ministerial officer of the law, engaged in the competitive enterprise of ferreting out crime, may not be authorized to substitute his judgment for that of the appellant and make a determination, on the spot, that the films found in the desk drawer of the appellant's home were to be classified as *obscene*.

The motion to suppress the films as evidence should have been sustained, and the holding by the Georgia Supreme Court that no question of freedom of speech or of the press is involved is error.

5.

NO EVIDENCE OF PRIOR KNOWLEDGE, THAT JUVENILES OR UNWILLING PERSONS VIEWED THEM OR OF PANDERING INVOLVED

On May 8, 1967, the United States Supreme Court

decided three different cases at one time. *Redrup v. State of New York, Austin v. Kentucky,* and *Gent v. State of Arkansas,* 386 U.S. 767, 87 S.Ct. 1414, Nos. 3, 16 and 50, October Term, 1966. All three cases involved selling and offering obscene literature. All three cases were reversed on First and Fourteenth Amendment grounds. In a per curiam decision, the Supreme Court held:

> "In none of the cases was there a claim that the statute in question reflected a specific and limited state concern for juveniles. * * * In none was there any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it. * * * And in none was there evidence of the sort of 'pandering' which the Court found significant in *Ginzburg v. United States,* 383 U.S. 463."

The record in the instant case reflects that there was no contention by the State that the appellant was doing any more than possessing the films, and there was a specific holding by the Georgia Supreme Court that *nothing* except possession need be alleged. There was no contention that the State was showing a concern for the morals of juveniles. There was no contention that the appellant was showing the films to persons unwilling to see them. There was no contention that he was pandering them.

It is unnecessary for the Court to review the evidence in the case to reach this question, for the State, by its very contention, seeks to punish the appellant for the *mere possession* of these films.

It is the constitutional right of every person in this country to have the freedom to choose what literature he desires to read or determine for himself what pic-

tures or films he desires to look at. To convict of *mere possession* is to deny a First Amendment freedom.

CONCLUSION

The statute under attack in this appeal violates the First and Fourteenth Amendments, the search warrant was void and the seizure of the films from the appellant's custody without a prior adjudication of obscenity or without specifically naming such films to be seized in a valid warrant was illegal, and the judgment of the Supreme Court of Georgia should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that I as a member of the Bar of the Supreme Court of the United States, have this day mailed 3 copies of this brief by first-class prepaid mail to Lewis R. Slaton, Solicitor General, counsel for Appellee, care of Fulton County Courthouse, Atlanta, Georgia 30303.

This_____day of November, 1968.

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WESLEY R. ASINOF
Attorney for Appellant